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In the Supreme Court of the United States

OCTOBER TERM, 1975

SUN FIRST NATIONAL BANK OF ORLANDO, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners seek review of the decision below enforcing an Internal Revenue summons requiring production of copies of tax returns of trusts of which petitioner-bank was trustee.

The pertinent facts are as follows: During the course of an Internal Revenue Service examination of petitioner-bank, the revenue agent requested that the bank produce its retained copies of income tax returns of 32 trusts filed by the bank as trustee.

The agent had become suspicious that returns for some trusts might not have been filed when he was informed that, while returns would be provided, all information identifying the particular trust would be deleted (Pet. App. A-7 to A-8). The agent commenced an audit of each trust for the purpose of ascertaining whether its tax liabilities had been correctly reported. Pursuant to these investigations, he issued a summons for the retained tax returns and records pertaining to the trusts. The petitioner-bank refused to produce the summonsed records. In this enforcement proceeding, the district court enforced the summons (Pet. App. A-1 to A-4), and the court of appeals affirmed (Pet. App. A-5 to A-13).

Petitioners contend (Pet. 14, 16) that enforcement of the summons was improper because the summons was issued "in order to explore a third party's papers" and "[t]here was no definite ongoing audit of the 32 taxpayers * * * prior to the time the summons was issued." However, these assertions are contradicted by the district court's findings, affirmed by the court of appeals, that the Service was conducting an audit of each trust (see Pet. App. A-12). The tered by petitioner-bank, and these trusts, not their beneficiaries, were the subjects of the audits. Although petitioners complain that the 32 trust accounts had been selected at random from a list of 150, the random selection of taxpayers to be audited, together with the random selection of items on returns for further examination, is a method which the Internal

Revenue Service has long utilized in order to enforce the tax laws.

Petitioners further argue (Pet. 14) that the Internal Revenue Service cannot have its summonses enforced unless it shows that "there was a substantial reason to believe that a taxable incident had occurred." This Court, however, rejected a similar contention in *United States* v. *Powell*, 379 U.S. 48, 57, where it observed that the Commissioner "can investigate merely on suspicion that the law is being violated, or even just because [he] wants assurance that it is not." Moreover, in *United States* v. *Bisceglia*, 420 U.S. 141, the Court reaffirmed its rejection of any "probable cause [requirement], in the traditional sense," stating that "[t]he purpose of the statutes is not to accuse, but to inquire" (420 U.S. at 146). Here, the agent testified that he became suspicious that returns required by law to be filed had not been filed and that he then commenced his investigations (R. A-48).[1] The decision below ordering enforcement of the summons is therefore entirely in accord with *Powell* and *Bisceglia*.[2]

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[1] "R." references are to the record appendix filed in the court of appeals.

[2] Petitioners also contend (Pet. 14-15) that the enforcement was improper because the Service had not attempted to obtain the returns from its files. The agent testified (R. A-45), however, that he had not been able to obtain a number of the returns. Furthermore, the summons also required production of trust instruments, records of income and disbursements and other bank documents relating to the trusts, which were not in the possession of the Service. (R. A-6).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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